February 13, 2003

EX PARTE - VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *CC Docket Nos. 01-338, 96-98, 98-147*

Dear Ms. Dortch:

I am writing on behalf of General Communication, Inc. ("GCI")[1] to respond to a February 6 *ex parte* submission by Alaska Communications Systems Group, Inc. ("ACS"), wherein ACS renews its request to be relieved from all of its unbundling requirements under the Communications Act of 1934, as amended by the landmark Telecommunications Act of 1996 (the "1996 Act").[2] According to ACS, these market-opening requirements are "unnecessary," and will in fact harm the public interest by promoting "unhealthy" competition in Alaska markets.[3] In reality, ACS' request for relief, if granted, would end the healthy – and for consumers, very beneficial – competition that has flourished in Alaska. ACS knows that it is the only company that today possesses loops which reach Alaska homes and businesses for the provision of telecommunications services: its proposal to end unbundling of loops (and all other elements) proposes nothing less than eliminating consumer choice, retail price competition, innovative service offerings and improved service quality – all of which would not have occurred if GCI had not been able to enter the local telecommunications market using unbundled network elements ("UNEs"). In addition to being substantively deficient, ACS' request for Anchorage-specific forbearance is procedurally inappropriate, and well outside the scope of this *Notice of Proposed Rulemaking*.

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1 GCI is a facilities-based CLEC that serves both residential and business customers in Alaska. GCI uses several methods to serve its customers: some customers are served entirely over GCI's own loops (e.g., 22 buildings in Anchorage are served via GCI's fiber ring); many customers are served via UNE loops, in combination with GCI-provided switching and transport; and other customers are served via UNE-P and total service resale.

2 Letter from Karen Brinkmann and Elizabeth Park, Latham & Watkins, LLP, to Marlene H. Dortch, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, and 98-147 (filed February 6, 2003) ("*ACS February 6 ex parte letter*").

3 *Id.* at 1.

ACS' true objection is not to the Commission's or the Regulatory Commission of Alaska's ("RCA") implementation of the 1996 Act, but to Congress' terms and goals in the 1996 Act itself. When Congress passed the 1996 Act, it recognized that:

> [I]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (e.g., central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.[4]

Congress, in Section 251(d)(2), set forth the standard for determining when network elements must be unbundled, requiring unbundling when "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[5] And although Congress gave the Commission the authority generally to forbear from enforcing provisions of the 1996 Act, it specifically precluded the Commission from forbearing from Section 251(c) obligations, including unbundling of network elements, until the requirements of Section 251(c) have been "fully implemented."[6]

Tellingly, ACS has again entirely failed to address the terms of the 1996 Act, or to even recognize that Congress chose to require incumbent LECs to unbundle network elements precisely because it recognized that the barriers to entry into local telephony were so substantial that competitors would have to rely on these elements to provide service. ACS still fails to provide any basis to demonstrate that GCI would not be impaired without access to UNEs, providing no legal or economic rationale to support its request for special relief. Instead, ACS' most recent letter replows the same ground, and in doing so, ACS makes several misstatements that must be corrected. More significant than what ACS says, however, is what ACS *does not* say. ACS once again has failed to demonstrate how GCI's share of the *retail* telecommunications market demonstrates that GCI will not be impaired without access to critical *wholesale* inputs – notably loops, transport and unbundled local switching. ACS never disputes the fact that when a connection to a GCI customer must run outside of GCI's switching office, all but a very small fraction of those connections must run over ACS loops – even in the Anchorage market in which GCI has achieved its highest retail penetration. ACS does not even contest that it has market power (i.e., the ability, in the absence of price regulation, to implement a small, but significant and non-transitory increase in price) in the market for loops, switching or any other network element. In short, ACS has failed to demonstrate that GCI will not be impaired in its ability to "provide the services that it seeks to offer" without access to UNEs (particularly loops) at

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4 S. Rep. 104-230, Joint Statement of Managers at 148.

5 47 U.S.C. § 251(d)(2).

6 47 U.S.C. § 160(d).

cost-based rates pursuant to Section 251(d)(2)(B). Accordingly, GCI urges the FCC to reject ACS' unsupported and anticompetitive request to prematurely release it from its unbundling obligations.

I. The ACS Blanket Exemption Request Is Devoid Of Any Market Analysis And Should Be Rejected.

ACS simply refuses to back up its request for blanket exemption from unbundling with any market analysis. It never defines a relevant product or geographic market for the UNE inputs that GCI purchases, it never attempts to inventory the actual and potential alternatives to use of the ACS network element, it never examines or even acknowledges the barriers to deployment of any actual or potential alternatives to that input, and it never answers the question asked by Section 251(d)(2): to what extent is GCI impaired in offering the services GCI seeks to offer without access to ACS unbundled elements. Further, ACS never even explains the basis for its core assumption – that GCI is not impaired without access to ACS UNE loops in the wholesale market because GCI has a substantial share of the retail market. As such, ACS lays no foundation for any claim that GCI is not impaired without access to UNEs or that forbearance is justified.

A. There Is No Ready Alternative To ACS Loops.

ACS, of course, refuses to engage in this rigorous antitrust-type analysis because it knows it cannot support its case analytically. Consider, for example, the unbundled loop element. With the exception of those few buildings served off of GCI's Anchorage fiber ring and the Aurora Subdivision, there are no alternative loop facilities deployed in ACS' markets.[7] Even with respect to buildings adjacent to GCI's fiber ring, building access issues present a substantial barrier to use of alternatives to ACS UNEs.[8] The only potential source of alternative loops for the mass market is cable telephony,

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[7] ACS wrongly suggests that GCI will not sell unbundled loops in the Aurora Subdivision, where GCI has installed its own loop plant. *See ACS February 6 ex parte letter* at fn. 28. In fact, GCI has offered unbundled loops to ACS, which ACS has declined to purchase, choosing instead to use resale.

[8] ACS' suggestion that GCI has obtained "exclusive" status in multi-tenant buildings is misleading. In two instances, GCI has entered buildings with its own facilities, and installed its own cabling inside the building. In both those instances, once ACS learned it was not selected as the service provider, it discontinued installations in those buildings. In one instance, ACS discontinued its installation despite being asked by the building owner to complete the installation so that its occupants would have a diversity of suppliers and routing. In any event, these isolated examples do not establish that building access is not a substantial barrier to the deployment of alternate loop facilities, even for buildings passed by a CLEC fiber. *See* First Report and Order and Further Notice of Proposed Rulemaking and Fifth Report and Order and Memorandum Opinion and Order, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* WT Docket No. 99-217 and CC Docket Nos. 96-98 and 88-57 (rel. October 25, 2000).

which the Commission has recognized to be a "nascent" technology.[9] Yet even if cable telephony were ready today for mass deployment – which it is not, because circuit switched cable telephony is non-standardized and IP-based cable telephony is still in the labs – it would be years before this technology could be fully rolled out throughout ACS' markets.[10] Nothing in the *USTA v. FCC* decision suggests that potential facilities, which cannot readily be deployed in a timely manner, should be considered as an alternative to the ILEC's network element, nor precludes consideration of barriers to the use of such potential alternatives to the ILEC's network element.[11] The reality is that today ACS is, for all but a sliver of the market, the only source of loop capability.

B. ACS Fails To Define The Relevant Loop Market, And Improperly Attempts To Combine Distinct Geographic Markets.

ACS' attempt to differentiate "expensive" from "inexpensive" loops illustrates why the Commission (or a state on delegation) must engage in a rigorous economic analysis. A proper market analysis would recognize that the geographic market for loops is point-to-point, e.g., loops to an ISP collocated in GCI's switching center (ACS' so-called inexpensive loops) are not substitutes for loops that run outside of the GCI switching center (the so-called expensive loops).[12] Similarly, once GCI begins deploying cable telephony, loops in the area in which cable telephony is deployed are not in the same geographic market as loops in areas where cable telephony is not deployed. The Commission has repeatedly made clear that telecommunications markets are point-to-point, and that it will only aggregate for the purposes of analysis point-to-point markets with similar characteristics.[13] ACS tries to blur these distinct markets.

C. ACS' Control Of Loops Impairs GCI's Use Of GCI's Own Switching Facilities.

Likewise, ACS goes through no such competition analysis with respect to unbundled switching. Although GCI has deployed a switch in Anchorage, Fairbanks and Juneau, it cannot actually use those

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[9] Memorandum Opinion and Order, *In the matter of Applications for Consent and Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Corp., Transferee,* MB Docket No. 02-70, FCC 02-130 at ¶ 192 (rel. November 14, 2002).

[10] *See* Letter from Frederick W. Hitz, III, GCI, to William Maher, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 at 6-8 (filed January 24, 2003) (*"GCI January 24 ex parte letter"*).

[11] 290 F.3d 415 (D.C. Cir. 2002).

[12] *ACS February 6 ex parte letter* at 8.

[13] *See* Reply Comments of General Communication, Inc., *In the matter of Review of Regulatory Requirements For Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337 at 15-16 (filed April 22, 2002) *citing Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* 12 FCC Rcd. 15756, 15794, ¶ 66 (1997).

switches to offer the services it seeks to offer unless it can connect those switches to a customer's loop. It is ACS' control over loops, and the inability to connect a GCI switch to an ACS loop, that precludes GCI's use of its switch as an alternative to ACS' unbundled switching (and also transport). GCI has detailed on the record of this proceeding that substantial barriers to use of GCI's own switch, including the inability to cross connect to loops at a central office and discrimination in the ordering and provisioning of unbundled loops, can and do prevent GCI from using its switch to serve substantial portions of the market.[14] For example, ACS' network design prevents GCI from cross-connecting with 29 percent of loops in Fairbanks and 52 percent of loops in Juneau, despite GCI's multiple collocations in both those markets.[15] ACS wants to have its cake and eat it too: in essence, ACS wants the Commission to declare that GCI is not impaired without access to ACS unbundled switching and transport based on the supposition that GCI can use its own switch and transport, even though ACS' own network design and its choice not to upgrade its Fairbanks and Juneau remotes to GR-303 capability prevents GCI from cross-connecting to ACS loops and using GCI switching and transport in those markets.[16] Moreover, ACS is simply wrong when it asserts that the costs GCI would incur in collocating and cross-connecting at a small, non-GR-303-capable remote site are the same costs ACS would incur. As GCI previously described in detail, it incurs costs above-and-beyond what ACS incurs, and these additional sunk costs can create impairment by raising the minimum viable scale, particularly in remotes with a small number of total lines.[17]

D. The FCC Has Never Condoned ILEC Discrimination In Provisioning Unbundled Loops.

ACS attempts to convert a limited provision of the *Local Competition Order* and the *UNE Remand Order* concerning interoffice transport facilities into a broad exemption from the requirement that it provide unbundled loops on a nondiscriminatory basis when doing so would require it install some additional piece of equipment.[18] This provision expressly states that ILECs have no obligation to construct *interoffice transport* facilities solely to meet a CLEC's requirements where the ILEC has not deployed transport facilities for its own use. The Commission's finding in that limited context is inapplicable, either directly or by analogy, to excuse ACS' discriminatory loop provisioning practices. Neither the 1996 Act, nor any Commission rule or decision supports an exemption from the express requirement that UNEs be provided on a nondiscriminatory basis.

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[14] *See, e.g.,* Letter from Frederick W. Hitz, III, GCI, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 (filed January 23, 2003) ("*GCI January 23 ex parte letter*"); GCI Comments at 8-12.

[15] *GCI January 24 ex parte letter* at 6.

[16] GCI has never asserted that ACS is required to "build new central offices where they are convenient for GCI." *ACS February 6 ex parte letter* at 6.

[17] *GCI January 23 ex parte letter* at 7.

[18] *ACS February 6 ex parte letter* at 3.

It is important to be clear on how this question arises, both in Alaska and elsewhere, and when state commissions have found ILECs to violate Section 251(c)(3)'s nondiscrimination requirement. When ACS offers service to retail customers, it will make network modifications necessary to serve that customer, such as installing an additional service drop or a pair gain device to allow a single twisted pair to provide additional virtual loops. ACS does not charge its retail customers for this work. As discussed in GCI's prior filings, the RCA found that ACS required GCI to pay an additional fee – over and above the standard recurring and non-recurring TELRIC-based charges for a UNE loop – when ACS added a service drop or a pair gain device to provision an existing loop for GCI.[19] Because ACS regularly performs these same activities for its retail customers without charge, the RCA concluded that ACS' behavior demonstrated a "pattern of disparity in the handling of service orders requiring installation of new equipment."[20] Accordingly, the RCA concluded that ACS was not meeting the parity of service requirements in the 1996 Act.[21] Other state commissions have similarly interpreted Section 251(c)(3)'s nondiscrimination requirements.[22] Significantly, this is not a question of

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[19] *GCI January 23 ex parte letter* at 8, 9, *citing* Order Requiring ACS to Permit Interim Query Access Into MARTENS or Another Appropriate Database, Requiring GCI to Follow ACS' Line Extension Provisions, for Construction of New Facilities, Requiring Filings, and Finding Petition to Modify Hearing Schedule Moot, *In the Matter of the Investigation into Disparities In Service Provided to Customers of a Competitive Local Exchange Carrier and an Incumbent Local Exchange Carrier,* Docket No. U-02-97, Order No. 3 at 12 (December 5, 2002) ("*RCA December 5 Order*").

[20] *Id.* at 11.

[21] *See id.* at 13. ACS downplays the RCA's Order concerning ACS' disparity in handling service orders, stating that "GCI's mention of these provisioning issues is merely a smoke screen to divert attention from the undeniable fact that it has achieved unprecedented levels of market share..." *ACS February 6 ex parte letter* at 12. However, GCI believes that the RCA's finding that ACS discriminated against GCI and ordered relief is clearly relevant. In fact, ACS' behavior exacerbates the impairment already created by its decision to deploy network facilities that foreclose access by its competitors. Moreover, GCI's withdrawal of its request for consideration of a complaint with this Commission is immaterial, and GCI fully intends to file a formal complaint.

[22] *See Re U.S. West Communications, Inc.*, 2002 WL 595155 at ¶¶ 64-66 (Ariz. C.C., March 15, 2002) (holding in accord with Staff position that Qwest must provide CLECs with UNEs on the same terms and conditions that it provides UNEs to itself or to its retail customers); *Re U.S. West Communications, Inc.*, 2002 WL 1554524 at 3-5 (Oregon Pub. Util. Comm'n, May 28, 2002) (holding in accord with Staff position that Qwest must construct new dark fiber facilities for a CLEC just as it would for any other retail customer. The Oregon Commission relied on an earlier decision in which it expressly held that ILEC must provide facilities where retail customers have access to those facilities. The Oregon Commission held that this requirement "would serve to implement the Act's antidiscrimination requirements"); *Re U.S. West Communications, Inc.*, 2001 WL 1672338 at 8 (Wash. U.T.C., November 15, 2001) (holding that Qwest must apply the same terms for provisioning facilities for CLECs as it would for its retail customers in the analogous situation); *Ovation Communications, Inc. v. Ameritech Illinois*, 1999 WL 1334695 at 16 (Ill. C.C., Dec. 20, 1999) (holding that Ameritech unlawfully discriminated against Ovation when Ameritech did not impose like construction charges on its retail customers); *Wyoming Public Svc. Comm'n*, 1999 Wyo. PUC LEXIS 539 at ¶ 9 (June, 30, 1999) (holding that US West could not assess nonrecurring charges differently for CLECs). *See also Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, 2002 WL 99739 (Mich. Appeals Ct., Jan. 22, 2002) (holding that the evidence supported the Michigan Commission's finding that Ameritech engaged in discrimination against MCI in the provision of unbundled local transport by unreasonably distinguishing between orders for ULT and orders for special access service, and by unreasonably distinguishing between its own need for additional

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whether ACS can charge GCI for a line extension when ACS would also charge its retail customer for a line extension, as ACS implies.

ACS' ability to discriminate in this manner against entrants in the provision of unbundled loops merely serves to confirm ACS' market power in the market for loops, the lack of alternatives available to CLECs, including GCI, to substitute for ILEC loops, and the extent to which GCI is impaired without access to unbundled loops. Indeed, the full (rather than truncated) section of the *UNE Remand Order*, from which ACS quotes selectively, supports a finding that CLECs are impaired without access to unbundled loops:

> [W]e find that, as a practical matter, building loop plant continues to be, in most cases, prohibitively expensive and time-consuming. Because of the size of their networks, incumbent LECs enjoy advantages of scope that competitors cannot replicate. We find that it would be unreasonable to expect a competitive LEC to invest the large sums of capital needed to build out ubiquitous loop plant before the competitive LEC has established a substantial and secure customer base.[23]

Of course, ACS also ignores one other critical fact: ILECs that built their networks as regulated monopolies enjoy economies of scale and scope, as well as first-mover advantages, which place them in a superior position to new competitive entrants that do not have guaranteed returns and a captive customer base. In fact, it is ACS' ownership of facilities that serve every customer premise in ACS' service area, combined with its still substantial market share, that justify the application of ILEC-specific market-opening requirements to ACS in the first place.

II. Facilities-Based Competition Is Not Stranded Investment.

ACS apparently believes that it has stranded investment every time GCI wins an ACS customer. This simply is not the case. When GCI serves a customer via UNEs obtained from ACS, ACS still "owns" its underlying network. Moreover, ACS enjoys a revenue stream from the TELRIC-based rates paid by the CLEC, and can use these very same facilities to serve the customer itself. Even assuming that GCI eventually serves its customers solely using its own facilities (i.e., through IP-based telephony provided over GCI's upgraded cable plant), ACS can (and will) still utilize its network to win back these

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capacity to serve its own customers and the needs of MCI); *Re Yipes Transmission, Inc.*, 2002 WL 1803881 at ¶ 48 (D.C.P.S.C., May 6, 2002) (holding that because Verizon DC would be willing to terminate unattached dark fiber for itself, it likewise would be required to undertake the necessary modification to provide access to dark fiber for Yipes).

[23] Third Report and Order and Fourth Notice of Proposed Rulemaking, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696 at ¶ 183 (1999) (*"UNE Remand Order"*).

customers from GCI. In other words, ACS only faces the threat of stranded investment if it has no inclination to actually compete for any customer lost to GCI. Granting ACS' request and thereby insulating it from the forces of competition would be contrary to the goals of the 1996 Act and the public interest.

III. ACS' Dissatisfaction With Adjudicated, Cost-Based UNE Rates Is Not Relevant To A Proper Impairment Analysis.

ACS repeatedly complains that it is not receiving "market-based" rates for its UNEs. But again, that is not what the 1996 Act permits. ACS is limited to a cost-based rate under Section 252(d)(1), including a reasonable profit. As GCI has already explained, there is no basis for concluding that the RCA's determination of ACS' cost-based rates are out of line with the determinations of other state commissions.[24] When compared to ACS' embedded loop costs, its UNE rates at or above the national average, so there should be no concern about the RCA's pricing decisions; if anything, ACS' existing UNE rates are too high.[25] Regardless, ACS draws no nexus between UNE pricing – which is not a part of this proceeding – and impairment, and its dissatisfaction with its UNE rates is not a proper grounds for waiving its obligation to provide UNEs altogether.

IV. ACS Confirms That It Is Making Money In Its Regulated Businesses, But Losing Money In Its Non-Regulated Businesses.

Finally, ACS fails to rebut the core finding of the Snavely, King report – that ACS' regulated telephone companies continue to generate substantial cash.[26] Indeed, even taking ACS' assertions on their face, EBITDA is not declining.[27] Moreover, ACS confirms that it is losing money in its competitive ventures.[28] The plain fact of the matter is that UNE pricing has little to do with ACS' overall profitability and returns. Even an outrageous and wholly unsupportable $5 across-the-board increase in monthly loop rates would increase ACS' revenues by a little over 1 percent and its EBITDA by 3

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24 To the extent ACS is complaining that its rates are below-cost, it is simply disputing the results of already-completed arbitrations. As GCI demonstrated in its response to the *Emergency Petition for Declaratory Ruling and Other Relief of ACS of Anchorage, Inc. and ACS of Fairbanks, Inc.*, WC Docket No. 02-201 (filed July 24, 2002), in a number of instances (particularly with respect to rates for Fairbanks and Juneau), ACS now claims that the RCA should have considered changes that ACS itself never presented to the RCA at arbitration. Opposition of General Communication, Inc., WC Docket No. 02-201 (filed August 20, 2002).

25 *GCI January 24 ex parte letter* at 14.

26 *GCI January 24 ex parte letter* at 12-14.

27 *ACS February 6, 2003 ex parte* at 15 ("EBITDA . . . remains flat.")

28 *Id.* at 14.

percent. In any event, ACS' earnings – a blatantly pro-competitor consideration – are not relevant to any determination of impairment.

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ACS' procedurally improper requests for special regulatory relief wholly lack merit. Where GCI rents ACS UNEs today, GCI lacks practical alternatives to the use of those UNEs. Assessing the availability and extent of barriers to use of alternatives to UNEs is precisely what the impairment test is designed to take into account. ACS believes GCI should be denied access to UNEs (a wholesale input) even when GCI is impaired without access to that input because using that wholesale input, GCI has been able to offer a successful competing retail product. ACS asks this Commission to do nothing less than rewrite the Telecommunications Act of 1996. To the contrary, GCI has used UNEs exactly as the 1996 Act contemplated to deliver the benefits to consumers that Congress foresaw competition would deliver.

Sincerely,

Tina M. Pidgeon /mlf

Tina M. Pidgeon
Vice President, Federal Regulatory Affairs